Supreme Court, U.S.
FILED
NOV 9 1993
OFFICE OF THE CLERK

No. 93-44

IN THE

Supreme Court Of The United States

October Term 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Brief for Appellant Time Warner Entertainment Company, L.P.

BRIAN CONBOY
THEODORE CASE WHITEHOUSE
WILLKIE FARR & GALLAGHER
Three Lafayette Center
1155 21st St., N.W.
(Suite 6000)
Washington, DC 20036-3384
(202) 328-8000

ROBERT D. JOFFE*
STUART W. GOLD
STEPHEN S. MADSEN
EDWARD J. WEISS
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, N.Y. 10019
(212) 474-1000

Counsel for Appellant Time Warner Entertainment Company, L.P.

*Counsel of Record

November 9, 1993

QUESTION PRESENTED

Whether Congress, consistent with the First Amendment, may compel operators of cable television systems to use their own channels of communications to carry the television signals of programmers favored by Congress—*i.e.* local broadcast television stations—in derogation of the editorial preferences of the operators and regardless of the effect on those programmers not favored by Congress.

LIST OF PARTIES

A list of all parties to this proceeding is set forth in the Jurisdictional Statement at ii-iii. The Rule 29.1 disclosure statement on behalf of Time Warner Entertainment Company, L.P., is set forth in the Appendix to the Jurisdictional Statement at 111a. It should, however, be amended so as to include US West Inc., as a limited partner.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	vii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT	2
A. Appellant's First Amendment Activities	3
B. The Must-Carry Provisions of the 1992 Cable Act	4
C. The FCC Must-Carry Regimes	7
D. The Decision Below	8
E. The Dissent Below	10
SUMMARY OF THE ARGUMENT	11
ARGUMENT	14
I. THE MUST-CARRY PROVISIONS TRIGGER STRICT SCRUTINY UNDER THE FIRST AMENDMENT	14
A. The Must-Carry Provisions Are Content-Based and Must Be Subjected to Strict Scrutiny	14
1. Judicial Review Under the First Amendment Requires Examination Beyond the Purportedly Content-Neutral Legislative Justifications Proffered	15
2. The Legislative Findings Themselves Indicate that the Must-Carry Provisions Are Content-Based	18

Page

3. The Must-Carry Provisions Compel Speech and That Triggers Strict Scrutiny 21

B. The Must-Carry Provisions Override Editorial Discretion and Should Be Struck Down Under *Tornillo* 23

C. The Must-Carry Provisions Trigger Strict Scrutiny Because They Establish a Preference for the Speech of Broadcasters at the Expense of the Speech of Cable Programmers 25

D. The Must-Carry Provisions Trigger Strict Scrutiny by Singling Out a Specific Segment of the Press 27

II. THERE ARE NO CHARACTERISTICS OF CABLE THAT JUSTIFY REDUCING ITS PROTECTION UNDER THE FIRST AMENDMENT 31

A. Physical Scarcity Does Not Characterize Cable and Cannot Justify Reduced First Amendment Protection 32

B. Economic Scarcity Cannot, as a Matter of Law, Reduce a Speaker's First Amendment Rights 33

C. Subsidy or Condition-Benefit Principles Are Not Implicated by the Must-Carry Provisions and Cannot Justify Reducing Cable's First Amendment Protection 36

Page

III. THE GOVERNMENT'S JUSTIFICATIONS FOR SECTIONS 4 AND 5 REST ON FACTUAL PREMISES THAT DO NOT EXIST AND THAT, AS A MATTER OF LAW, ARE ILLEGITIMATE 38

A. Congressional Findings, When Used to Justify an Abridgment of First Amendment Rights, Must Be Subjected to Meaningful Judicial Review 38

B. Local Broadcast Television Is Not Imperiled 40

1. The Assumption Concerning Cable's Incentives Fostered By Competition for Advertising Revenue 41

2. Cable's Ability to Act on Its Incentives 42

3. The A/B Switch Finding 42

C. There Is No Need to Further a Diversity of Voices, and Congress Cannot, in Any Event, Legislate in the Name of Diversity When It Does So By Burdening the Speech of Some Speakers in Order to Promote the Voice of Others 44

IV. THE MUST-CARRY PROVISIONS ARE NEITHER PRECISELY NOR NARROWLY TAILORED TO FURTHER ANY GOVERNMENTAL INTEREST 46

A. The Must-Carry Provisions Do Not Further the Purported Governmental Interests 47

B. There Are Obviously Less Burdensome Alternatives to the Must-Carry Provisions 48

	Page
C. By Their Terms, the Must-Carry Provisions Are Fatally Overbroad	49
CONCLUSION	50

TABLE OF AUTHORITIES

Cases	Page(s)
Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987)	15, 28, 30
Associated Press v. NLRB, 301 U.S. 103 (1937)	28
Associated Press v. United States, 326 U.S. 1 (1945)	28, 35
Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)	43
Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989)	46
Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam)	26, 27, 45
Burson v. Freeman, 112 S. Ct. 1846 (1992)	20, 43
Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988)	7, 8, 42, 43
City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993)	15, 16, 46, 48
City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988)	27
City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986)	11, 24
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)	16, 17

	Page(s)
Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n, 447 U.S. 530 (1980)	46
FCC v. League of Women Voters, 468 U.S. 364 (1984)	32
FCC v. Midwest Video Corp., 440 U.S. 689 (1979)	24
Grosjean v. American Press Co., 297 U.S. 233 (1936)	30
Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985)	21
Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977)	3, 33
International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992)	45
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)	12, 31, 32
Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992)	39
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)	39
Leathers v. Medlock, 111 S. Ct. 1438 (1991)	11, 15, 24, 28, 29, 31
Lorain Journal Co. v. United States, 342 U.S. 143 (1951)	28
Lovell v. City of Griffin, 303 U.S. 444 (1938)	28
Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)	38

	Page(s)
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	*passim*
Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983)	15, 28, 29, 30
NAACP v. Button, 371 U.S. 415 (1963)	46
Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1 (1986) (plurality opinion)	22, 23, 26, 45
Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), *aff'd on narrower grounds*, 476 U.S. 488 (1986)	33
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)	22, 23
Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986)	3, 7, 33, 49
R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992)	20
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	10, 12, 32
Riley v. National Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781 (1988)	21, 22
Roth v. United States, 354 U.S. 476 (1957)	27
Rust v. Sullivan, 111 S. Ct. 1759 (1991)	36, 37
Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989)	39

	Page(s)
Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501 (1991)	15, 16, 43
Smith v. California, 361 U.S. 147 (1959)	27
Sunbelt Television, Inc. v. Jones Intercable, Inc., 795 F. Supp. 333 (C.D. Cal. 1992)	31
Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987)	32
Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974)	37
Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383 (S.D. Fla. 1991)	33
Thomas v. Collins, 323 U.S. 516 (1945)	27
Time Warner Entertainment Company, L.P. v. FCC, ___ F. Supp. ___, 1993 WL 393000 (D.D.C. Sept. 16, 1993)	29
Turner Broadcasting System, Inc. v. FCC, 113 S. Ct. 1806 (1993) (Rehnquist, C.J., in chambers)	25, 36
Turner Broadcasting System, Inc. v. FCC, 810 F. Supp. 1308 (D.D.C. 1992) (three-judge court)	6
United States v. O'Brien, 391 U.S. 367 (1968)	*passim*
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	9, 16, 17, 46
West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)	22

	Page(s)
Wooley v. Maynard, 430 U.S. 705 (1977)	21, 22

Statutes

17 U.S.C. § 111	37
28 U.S.C. § 1253	2
28 U.S.C. § 2284	2
47 U.S.C. § 224	37
47 U.S.C. § 303b	20
47 U.S.C. § 335	29
47 U.S.C. § 522	33
47 U.S.C. § 531	6
47 U.S.C. § 532	6, 48
47 U.S.C. § 534	*passim*
47 U.S.C. § 535	*passim*
47 U.S.C. § 541	3, 33, 34
47 U.S.C. § 542	37
47 U.S.C. § 543	6, 25
47 U.S.C. § 544a	48
47 U.S.C. § 548	34
47 U.S.C. § 555	2
Pub. L. No. 102-356 § 16, 106 Stat. 954 (1992) (to be codified at 47 U.S.C. § 303)	20
The Cable Television Consumer Protection and Competition Act of 1992	*passim*

Page(s)

Administrative Materials

H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) 19, 42, 47

In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, MM Docket No. 85-349, 1 F.C.C. Rcd. 864 (1986), *reconsid. denied*, 2 F.C.C. Rcd. 3593 (1987) 24

In re Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992—Home Shopping Station Issues, MM Docket No. 93-8, Report and Order, 8 F.C.C. Rcd. 5321 (1993) 20

In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992—Horizontal and Vertical Ownership Limits, MM Docket No. 92-264 Second Report and Order (adopted September 23, 1993; released October 22, 1993) 34, 41

In re The Revision of Programming and Commercialization Policies, Ascertainment Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, MM Docket No. 83-670, Report and Order, 98 F.C.C. 2d 1076 (1984) 20

Page(s)

In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Gen. Docket No. 84-282, 102 F.C.C. 2d 143 (1985) 32

S. Rep. No. 92, 102d Cong., 1st Sess. (1991) . . . 19, 34, 38

Cable System Broadcast Signal Carriage Report, FCC Staff Report, Policy & Rules Division of the Mass Media Bureau, September 1, 1988 42

Miscellaneous

Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975) 27

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 32

No. 93-44

IN THE

Supreme Court Of The United States

October Term 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Brief for Appellant Time Warner Entertainment Company, L.P.

OPINION BELOW

The opinion of the three-judge district court is reported at 819 F. Supp. 32 (D.D.C. 1993). It is reprinted in the Appendix to the Jurisdictional Statement at 1a-72a.

JURISDICTION

The judgment of the district court was entered April 8, 1993. A timely notice of appeal was filed in the district court on behalf of Time Warner Entertainment Company, L.P. on May 3, 1993. J.S. App. 74a-75a.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253. In § 23 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 555(c)(1), Congress required that challenges to the constitutionality of §§ 4 and 5 of the Act "be heard by a district court of three judges convened pursuant to [28 U.S.C. § 2284]".

CONSTITUTIONAL AND STATUTORY PROVISIONS

In pertinent part, the First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press".

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1471-1481, are lengthy provisions and their text is reprinted in the Appendix to the Jurisdictional Statement at 82a-110a and in the Joint Appendix ("J.A.") at 3-33.

STATEMENT

Time Warner Entertainment Company, L.P. ("Time Warner"), is, among other things, a cable system operator and a cable programmer.[1] Along with the other appellants in this proceeding, Time Warner challenged the constitutionality of §§ 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act" or "the Act"), 47 U.S.C. §§ 534, 535, on First and Fifth Amendment grounds. Sections 4 and 5, the so-called "must-carry" provisions, require cable operators to carry local commercial and noncommercial broadcast stations on their cable systems. The three-judge district court, over the dissent of

[1] Time Warner operates cable systems and creates programming through its unincorporated division, Time Warner Cable ("TWC"). Through another unincorporated division, Home Box Office ("HBO"), Time Warner provides cable operators with video programming for dissemination over their cable systems.

Circuit Judge Williams, denied appellants' First Amendment claims and upheld the must-carry provisions.[2]

A. Appellant's First Amendment Activities.

In operating each of its cable systems, TWC, like cable operators generally, engages in a number of editorial activities. One aspect of a cable operator's editorial discretion involves selecting the programming it wants to provide its cable system subscribers from the diverse array of available programming sources.[3] Cable operators also designate channel locations for programming services and package the selected programming into tiers of service.[4] In exercising each aspect of its editorial discretion, one important goal of the cable operator is to present

[2] Appellants also challenged § 6 of the 1992 Cable Act ("retransmission consent") on the ground that it was not severable from §§ 4 and 5. The retransmission consent provision makes it unlawful for a cable operator to retransmit the signal of a commercial broadcast television station without its consent, unless the station has elected must-carry status. Because the majority upheld § 4, the court below did not adjudicate appellants' claim that § 6 is not severable from § 4. If the decision below is reversed, the severability question should be remanded to the three-judge court.

[3] Presently, there are more sources of programming than there are channels available on most cable systems. *See* Klein Aff. ¶ 10 (J.A. 304). Although the channel capacity on any given cable system at any point in time is finite, the number of cable systems in any locale is not physically limited. It is undisputed on the record below that cable is not characterized by an absolute physical limitation like the electromagnetic spectrum that characterizes the broadcasting industry. Federal Defs.' Resp. to Time Warner Entertainment Company L.P.'s Statement of Material Facts Allegedly Not in Dispute ¶ 23 (J.A. 370); Collins Aff. ¶ 21 (J.A. 247). *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1449 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) ("*Quincy*"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977) ("*HBO*"). Rather, local communities are physically able to accommodate multiple cable operators—a fact explicitly recognized by Congress in the 1992 Cable Act, which prohibits exclusive franchises. *See* 1992 Cable Act, § 7(a)(1), amending 47 U.S.C. § 541(a)(1).

[4] The "basic" tier of service is a service offering that cable operators must provide to all their subscribers, and it is the service tier available at the minimum monthly price. TWC's systems also typically offer an optional tier of service, called the "standard" tier, which generally offers more satellite-delivered programming.

the most attractive package of news, information and entertainment to its subscribers. Rosenblum Aff. ¶ 5 (J.A. 320). In addition, cable operators, including TWC, increasingly create and produce their own programming for distribution over their cable systems. For example, TWC produces "New York 1", a 24-hour local news channel offered to its subscribers on its New York City systems. Collins Aff. ¶ 4 (J.A. 241).

HBO operates two programming services, the Home Box Office Service and the Cinemax Service, Bewkes Aff. ¶ 2 (J.A. 223), each of which is generally not included in the basic or standard tier and is sold to subscribers for an additional monthly subscription fee. *Id.* at ¶ 3.[5] The HBO Service offers a wide variety of programming, including motion pictures, sporting events, concerts and documentaries. In recent years, HBO has produced programs on controversial subjects such as AIDS and abortion, as well as programs critical of the United States Government and major corporations.[6]

Like all cable programmers, HBO must obtain carriage on cable systems in order to reach a cable audience. Thus, it must vie for carriage on cable systems with all other sources of video programming. Without carriage on a sufficient number of cable systems or other multichannel video programming delivery systems, a cable programmer, such as HBO, will not generate audience levels sufficient for economic viability.

B. The Must-Carry Provisions of the 1992 Cable Act.

The must-carry provisions of the 1992 Cable Act require cable operators to set aside significant portions of their channel capacity for the carriage of local commercial and noncommercial broadcast television stations. Section 4 of the Act requires most cable operators—those operating systems with more than 12 activated channels—to devote up to one-third of their channel

---

[5] HBO also owns and operates, through a joint venture, a programming service known as Comedy Central, which generally is offered to subscribers as part of a service tier. *Id.* at ¶ 2.

[6] A more detailed description about the particular programming offerings provided by HBO is set forth in the affidavit of Jeffrey Bewkes. *See* J.A. 224-25.

capacity to carriage of local commercial broadcast stations. 47 U.S.C. § 534(b)(1)(B); *see also id.* § 534(c)(1)(A)-(B).[7] The cable operator must carry the signal of the commercial broadcast station "in its entirety". *Id.* § 534(b)(3)(A). When there is an insufficient quantity of full power local commercial broadcast stations to fulfill the required "set asides", cable operators also must carry "low power" broadcast stations. *Id.* § 534(c)(1)(A)-(B). Further, any qualifying local commercial station has the right to elect its channel position on the cable system from among three specified options: its over-the-air channel assignment; the channel on which it was carried on the cable system on July 19, 1985; or the channel on which it was carried on January 1, 1992. *Id.* § 534(b)(6).

In addition to the required one-third allocation of channel capacity for *commercial* stations, § 5 requires cable operators to carry local *noncommercial* educational stations. Any cable system with more than 36 channels generally must carry any qualifying local noncommercial station. 47 U.S.C. § 535(b)(1). Cable systems with between 13 and 36 channels are required to carry up to three noncommercial stations. *Id.* § 535(b)(3). In addition, and notwithstanding any other provision of § 5, every cable operator is required to carry all qualified noncommercial stations "whose signals were carried on their systems as of March 29, 1990". *Id.* § 535(c). If an insufficient number of noncommercial stations is present in a cable operator's service area, a cable operator may be required to import and carry at least one noncommercial station from another community. *Id.* §§ 535(b)(2)(B)(i), (b)(3)(B). Section 5 also gives noncommercial stations channel positioning rights similar to those granted to commercial stations by § 4. *Id.* § 535(g)(5).

Taken together, §§ 4 and 5 significantly injure cable operators and programmers. *First*, a cable operator must include the entire programming content of specified local commercial and noncommercial broadcast television stations in the array of

---

[7] The average capacity of a cable system in the United States is about 40 channels, Klein Aff. ¶ 7 (J.A. 303), and virtually all cable systems have a channel capacity that exceeds 12 channels.

programming services it provides subscribers, regardless of whether the cable operator wants to do so. *Second*, cable operators cannot fashion, in the manner they deem appropriate, the package of programming provided to subscribers, because the must-carry provisions (1) give broadcast stations the right to specify, within certain parameters, the cable channel on which they must be carried, and (2) require cable operators to include each mandated station on the basic tier. *See* 47 U.S.C. §§ 534(b)(7), 535(h), 543(b)(7). *Third*, the must-carry provisions, by requiring cable carriage of local broadcasters, prefer the content of those stations over the content of the diverse offerings of cable programmers, who must, in the absence of a right to carriage, vie for whatever available channel capacity might remain on cable systems.[8]

---

[8] On a cable system of 36 channels, § 4 guarantees qualifying commercial broadcasters the right to occupy up to 12 channels and § 5 requires carriage of up to 3 noncommercial stations—together occupying over 40% of available capacity. In addition, the Cable Communications Policy Act of 1984 ("the 1984 Cable Act") separately requires cable operators to make available up to 15% of their capacity to unaffiliated programmers on a leased access basis, 47 U.S.C. § 532(b)(1), and requires dedication of a potentially unlimited number of channels for public, educational and governmental ("PEG") usage. *See* 47 U.S.C. § 531.

Indeed, the 1992 Cable Act represents a harsh and invasive regulatory scheme, which, *inter alia* (and in addition to the foregoing), limits the number of subscribers a cable system may have; limits the number of affiliated programmers a cable operator may carry on its system; forbids vertically integrated cable programmers from entering into exclusive contracts for programming distribution unless approved by the FCC; and subjects to price regulation any cable system not subject to "effective competition", a term defined by the statute so as to encompass virtually every cable system in the country. In this civil action, Time Warner also challenged the constitutionality of these provisions, as well as the PEG and leased access provisions of the 1984 Cable Act. However, these claims were severed on jurisdictional grounds by the three-judge court, over a dissent from one of the judges, from the claims asserted against the must-carry provisions, *Turner Broadcasting System, Inc. v. FCC*, 810 F. Supp. 1308, 1315 (D.D.C. 1992) (three-judge court), and they are not presently before this Court.

C. The FCC Must-Carry Regimes.

Must-carry regimes imposed upon cable operators by the Federal government for the benefit of local broadcasting are not without precedent. On two previous occasions, the Federal Communications Commission ("FCC") has, by regulation, created similar, albeit less onerous, regimes. In each case, however, the District of Columbia Circuit invalidated these must-carry schemes. *Quincy*, 768 F.2d at 1463; *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988) ("*Century*").

In *Quincy*, the District of Columbia Circuit found that the must-carry rules at issue "coerce[d] speech" by requiring carriage of the signals of local broadcasters, and "significantly compromise[d]" a cable operator's "otherwise broad discretion to select the programming it offers its subscribers". 768 F.2d at 1452. Moreover, the rules were "explicitly designed" to prefer local broadcast stations over cable programmers. *Id.* at 1451 ("[t]heir very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming advantage over cable programmers"). The court invalidated the rules, because the proffered justification—"the preservation of free, local television service"—was entirely unsubstantiated, *id.* at 1459, and the rules were "grossly overinclusive", *id.* at 1460.

In response to the *Quincy* decision, the FCC adopted a new version of the rules. Their premise was that an inexpensive technical device, known as an "A/B switch", which enables cable subscribers to switch back and forth between cable input and reception of over-the-air signals by antenna, would adequately protect local broadcasting, but that a five-year interim must-carry regime was necessary to protect local broadcasting until subscribers were educated about how to use such switches.

In *Century*, the court reviewed and invalidated these new rules, again concluding that no factual predicate existed to support them. *First*, the court could not find any factual support for the Commission's conclusion that it would take consumers five years to learn about use of A/B switches. *Century*, 835 F.2d

at 302 (rejecting such a "sluggish profile of the American consumer"). *Second*, to the extent the FCC assumed that without must-carry rules cable operators would drop local broadcasters, the court found that "[e]xperience belies that assertion"; that cable operators "generally did not drop the local broadcast signals" being carried before the *Quincy* decision; and, that "both the Federal Trade Commission and the Department of Justice have concluded . . . that the absence of must-carry would not harm local broadcasting". *Id.* at 303.

D. The Decision Below.

A divided three-judge court rejected the claims asserted below by Time Warner, granted defendants' motion to dismiss, and dismissed plaintiffs' complaints.[9] The majority held that the 1992 Cable Act represented Congress's use of "its regulatory powers over the economy to impose order upon a market in dysfunction", J.S. App. 12a, and that "[t]he Cable Act of 1992 is simply industry-specific antitrust and fair trade practice regulatory legislation". *Id.* at 13a. Recognizing that cable operators might be constrained in determining which programming to carry on their cable systems and under what conditions, the majority nonetheless believed that "the First Amendment should not unduly inhibit Congress in what clearly appears on its face to be an effort to level the economic playing field in the television industry". *Id.* at 22a. Further, although acknowledging that cable speakers use video signals as their means of conveying information, *id.* at 12a, the majority analogized the distribution of video signals to regulation of commercial commodities like "printing presses, or broadcast transmitters; loudspeakers or movie projectors", *id.* at 13a, and concluded that Congress intended to "restore competitive balance and assure a functional market in the distribution of video signals". *Id.* at 19a.[10]

---

[9] The term "majority" refers to the opinion of Judge Jackson below, in which Judge Sporkin, although also writing separately, concurred.

[10] The concurring opinion termed appellants' First Amendment claims "mischievous" because "[i]t is inconceivable that our forefathers at any time contemplated that the First Amendment would be used to regulate an industry that came into existence over 150 years after the Bill of Rights was adopted". *Id.* at 47a.

In considering the appropriate standard of judicial review, the majority indicated that "[s]trict scrutiny applies only if governmental regulation is overtly content-based or presents an opportunity for official censorship". *Id.* at 16a. Finding that Congress did not intend to regulate content, the majority held that the must-carry provisions were not content-based. *Id.* at 19a. Further, having rejected appellants' arguments that strict scrutiny was appropriate on other grounds (*i.e.*, because the must-carry provisions compel speech; because they promote the speech of broadcast speakers at the expense of the speech of cable programmers; and because they single out a member of the press for burdens from which other members of the press are exempt), the majority determined that the standard of review established in *United States v. O'Brien*, 391 U.S. 367 (1968), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), applied. *Id.* at 22a.[11]

The majority held that the must-carry provisions passed constitutional muster under this standard. *First*, the majority found that the preservation of local broadcasting was an important governmental interest. Although appellants had claimed and offered supporting evidence that local broadcasting was not imperiled—indeed, that local broadcasting had been thriving even after the District of Columbia had struck down the FCC's must-carry regime in *Quincy*—the majority deferred to Congress. *Id.* at 26a. *Second*, the majority held that the must-carry provisions were sufficiently tailored to further the interest in preserving local broadcasting, again reaching that result by deferring to Congress. *Id.* at 27a ("[o]nce again, the Court is unwilling to second-guess

---

[11] Although acknowledging that "conflicting signals can be discerned from the case law" for determining whether a regulation is content-based, the concurring opinion framed a novel test: "You know it when you don't see it." *Id.* at 44a. Finding that "[t]his is such a case", *id.*, the concurring opinion agreed that review under *O'Brien* was appropriate for the cable operators' claims. *Id.* at 43a. However, the concurring opinion reviewed the First Amendment claims of cable programmers under a rational review standard. *Id.* at 46a-47a.

Congress' determination that the must-carry provisions are necessary to accomplish its objective").[12]

E. The Dissent Below.

In dissent, Circuit Judge Williams concluded that strict scrutiny applied. *First*, he determined that the must-carry provisions were content-based, both because Congress had made a decision as to who should qualify for mandatory access on the basis of an explicit content-related finding, *id.* at 51a (citing 1992 Cable Act § 2(a)(11)), and because, "by virtue of provisions of law outside the 1992 Act, the term used by the Act to define the benefitted class *automatically* entails content requirements". *Id.* at 52a. *Second*, by requiring carriage of local broadcasters, §§ 4 and 5 mandated speech: this requirement was certain to alter the content of speech because "cablecasters must replace the programs they would have chosen, regardless of origin, with programs selected by local broadcasters". *Id.* at 54a. Judge Williams also indicated that strict scrutiny was appropriate because the must-carry provisions infringed upon a cable operator's editorial discretion to select programming, *id.* at 55a, and because the must-carry rules "are in substance indistinguishable from a tax-subsidy combination—a tax falling exclusively on cablecasters, in an amount large enough to fund a subsidy for local broadcasters". *Id.* at 56a.

The must-carry provisions failed to withstand strict scrutiny. Reviewing the interest in promoting a diversity of views on cable television, Judge Williams termed the fit between that interest and the must-carry provisions "extremely weak", and insufficient to support their constitutionality. *Id.* at 58a. Further, he found it "extremely doubtful" that a goal to protect local content could

---

[12] With respect to the cable operators' claims, the concurring opinion agreed that the must-carry provisions satisfied the *O'Brien* standard, *id.* at 48a. As for the programmers' claims, the concurring opinion concluded that the must-carry provisions survived rational basis review. Drawing upon language articulated in the broadcast context, the concurring opinion suggested that, if the must-carry rules fail to accomplish their objectives, "there will be time enough to reconsider the constitutional implications". *Id.* at 45a (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)).

ever represent a compelling interest, and that in any event, "far less restrictive means are readily available" to further that end, including direct subsidies. *Id.* at 61a. With respect to the preservation of local broadcasting, Judge Williams found no evidence that over-the-air broadcast television needed protection, instead, the evidence adduced by appellants indicated "quite the opposite". *Id.* at 62a. Again, Judge Williams declared it "obvious" that less intrusive means than the must-carry provisions were available. *Id.* at 66a.[13]

SUMMARY OF THE ARGUMENT

Cable operators and cable programmers, a principal source of news, information and entertainment for today's American public, indisputably constitute a segment of the press. *See Leathers v. Medlock*, 111 S.Ct. 1438, 1442 (1991) ("[c]able television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press'."); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats").

The must-carry provisions directly, not incidentally, interfere with the ability of this segment of the press to engage in speech and to act in an editorial capacity by capturing a substantial

---

[13] Judge Williams also rejected the assumption that over-the-air broadcasting was threatened, either because cable operators had dropped broadcast stations in the past or because cable had an incentive to do so to increase its advertising revenues. *Id.* at 63a-66a. He found it unnecessary, however, to express an opinion as to the appropriate level of deference to accord the legislative findings articulated in the 1992 Cable Act, "because the legislative findings simply do not support the inferences needed to sustain must-carry". *Id.* at 67a ("[i]f findings as scantily connected to the conclusion as these can justify must-carry, then the door is open—even in the area of First Amendment rights—to exercise of the most naked interest-group preferences").

portion of a cable operator's channel capacity and compelling that operator to carry speech selected by government—that of local broadcast stations—regardless of whether the operator wants to carry those stations or whether cable subscribers want to view them. The majority below declined to apply strict scrutiny to these provisions, instead applying the less exacting standard of *O'Brien*, accepting, without critical analysis, the congressional findings articulated in the 1992 Cable Act as content-neutral, and expressing the belief that "the must-carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators, broadcasters, and programmers have in contemplation to deliver". J.S. App. 13a.

Application of *O'Brien* scrutiny, rather than strict scrutiny, was error. The must-carry provisions dictate the content of programming that a cable operator must provide to its subscribers and are thereby content-based. Moreover, the congressional findings in the 1992 Cable Act are the direct result of concerns or judgments related to content. And, although ignored or otherwise distinguished by the majority below, established principles of First Amendment jurisprudence require strict scrutiny of government regulation that compels speech; that prefers the speech of certain speakers by restricting the speech of others; or that singles out a segment of the press for burdens from which all other speakers are exempt.

The failure to apply strict scrutiny to the must-carry provisions also cannot be attributed to any particular characteristic of cable television. Although this Court has recognized that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them", *Red Lion*, 395 U.S. at 386 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)), the converse of this established principle is equally significant—that the First Amendment protects all members of the media equally, unless and until it is shown that particular characteristics of the medium justify taking away from that First Amendment protection. Because there are no such characteristics peculiar to cable, the failure to recognize cable's speech as fully protected under the

First Amendment signals an evisceration of the free speech and free press clauses of the First Amendment, and indicates that technological innovation in the area of First Amendment speech (*e.g.*, newspapers as they distribute via videotext) will come at a precious price—a sacrifice in First Amendment protection. Such an outcome would result in a loss of fundamental freedom and is not warranted on the record in this case.

Whether subjected to strict scrutiny or to the less exacting standard ostensibly applied by the majority below, the must-carry provisions fail. Application of any level of scrutiny other than the exceedingly deferential analysis applied by the majority below makes apparent that the interests asserted as justifying enactment of the must-carry provisions—preserving local broadcasting and promoting a diversity of voices in the marketplace—do not have a basis in fact. Local broadcasting is not imperiled and, given the variety of programming available on cable, cable does not pose a threat to diversity in the marketplace—instead, it has achieved it. Moreover, if the must-carry provisions seek to protect local broadcasting or to further diversity, they do so in a constitutionally impermissible manner—by preferring the content of local broadcasters over, and at the expense of, the content of cable programmers.

Beyond the insufficiency of the interests asserted in support of the must-carry provisions, these provisions also fail to further their purported ends. Given that Congress has recognized that cable operators have not dropped broadcasters to any noteworthy extent, a purported loss of audience for broadcasters cannot be redressed by a law that compels carriage. And, even if conceptually these provisions can be said, in some manner, to further the governmental interests identified, they do so in a far more intrusive manner than is necessary, or constitutionally permissible.

ARGUMENT

I. THE MUST-CARRY PROVISIONS TRIGGER STRICT SCRUTINY UNDER THE FIRST AMENDMENT.

A. The Must-Carry Provisions Are Content-Based and Must Be Subjected to Strict Scrutiny.

Although acknowledging "that video signals have no other function than to convey information", the majority, relying upon its interpretation of the various findings enacted with the 1992 Cable Act, concluded that the must-carry provisions were "essentially economic regulation", J.S. App. 13a, and not content-based, because "Congress' primary purpose in enacting must-carry was to restore competitive balance and assure a functional market in the distribution of video signals". *Id.* at 19a. The majority thus held that §§ 4 and 5 were not subject to strict scrutiny. *Id.* at 13a, 22a.

This mode of analysis lacks support from the decisions of this Court, and it represents a narrow, even dangerous, approach to judicial review under the First Amendment. Whether legislation is content-based does not, as the majority below apparently believed, begin and end with the various legislative justifications proffered in support of that legislation. The majority's conclusion, that §§ 4 and 5 constitute mere economic regulation akin to regulation of a "commodity", when they directly, and not incidentally, impair speech, demonstrates the error of undertaking review in this way. Even focusing exclusively upon Congress's findings, as the majority did, the findings reveal judgments related to content, and a legislative determination as to the relative worthiness of the speech Congress has chosen to prefer. Finally, the majority's failure to apply strict scrutiny ignored or misconstrued this Court's First Amendment decisions that stand for an unequivocal proposition: Government may not, absent a compelling justification and a precise fit between means and ends, dictate the content of information that any speaker must disseminate to the public.

1. Judicial Review Under the First Amendment Requires Examination Beyond the Purportedly Content-Neutral Legislative Justifications Proffered.

"Absent an indication of a Congressional purpose, whether avowed or covert, to effect a degree of content-control by mandating carriage of 'local' broadcasters' signals", the majority believed that the must-carry provisions could not be deemed content-based. *Id.* at 22a; *see also id.* at 16a ("[s]trict scrutiny applies *only* if governmental regulation is overtly content-based or presents an opportunity for official censorship") (emphasis added). This analysis clearly turns on manifested legislative intent, and, as a result, presents an obvious risk of abuse. Provided Congress can cobble up an appropriate set of content-neutral "findings", it can successfully shield virtually any statutory scheme from judicial review. Thus, the majority's test analytically seems flawed, and indeed, does not comport with a principle often emphasized by this Court: Legislative intent is not the linchpin for constitutionality under the First Amendment. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1516 (1993) (striking down City's regulatory scheme without regard to City's *mens rea* in enacting it); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S.Ct. 501, 509 (1991) ("[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment") (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)); *Leathers*, 111 S.Ct. at 1442-43 (1991) (same); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) ("no evidence of an improper censorial motive" need be adduced). Quite the opposite, this Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment". *Simon & Schuster*, 112 S.Ct. at 509 (quoting *Minneapolis Star*, 460 U.S. at 592).[14] Thus,

---

[14] This is not to say that the must-carry provisions aim at "proper governmental interests", for, as shown *infra* at pp. 40-45, the interests Congress identifies do not, as a factual matter, exist, and the manner in which Congress

judicial review does not begin and end with whether government can assert a content-neutral justification.

Two recent decisions from this Court illustrate this principle. The City of Cincinnati in *Discovery* contended that its regulation prohibiting the distribution of commercial handbills via newsracks was motivated by content-neutral justifications, such as safety and aesthetics. Because these justifications were "entirely unrelated to the content of [the commercial] publications", it was argued that the regulation was not content-based. *Discovery*, 113 S.Ct. at 1516. This Court disagreed: "True, there is no evidence that the city has acted with animus toward the ideas contained within [the commercial] publications, but just last Term we expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas'." *Id.* (citation omitted) (ellipsis in original). Recognizing that the "very basis for the regulation is the difference in content between ordinary newspapers and commercial speech", the ban "by any commonsense understanding of the term" was "'content-based'". *Id.* at 1516-17.

Similarly, in *Simon & Schuster*, the Crime Victims Board of New York argued that the "Son of Sam" law was not content-based because there was no intent to suppress particular ideas. 112 S.Ct. at 509. This Court dismissed the argument, held the law to be content-based and struck it down after applying strict scrutiny.

In holding the "Son of Sam" law to be content-based in *Simon & Schuster*, this Court made clear that it was not resolving the question of whether the statute was content-neutral under the decisions in *Ward* and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) ("*Renton*"). *See* 112 S.Ct. at 511 n.**. Necessarily, the analysis set forth in *Ward* and *Renton* is not the exclusive means for determining whether legislation is content-based. Indeed, the analysis undertaken in both *Simon & Schuster* and *Discovery* indicates that a *Ward* and *Renton* analysis is a

---

seeks to further those interests is, as a matter of law, impermissible.

secondary analysis, not a primary analysis, that is to be undertaken only when a statute is not content-based under other prevailing principles of First Amendment law. Analyzed in this manner, a "neutral" justification cannot salvage what is otherwise a content-based provision. Further, the decisions in *Ward* and *Renton* themselves indicate that their formulation of a content-based analysis is appropriate only when the impact upon speech is truly incidental (*e.g.*, a regulation requiring use of a sound system, provided by the City, for concert performers on City-owned property in order to control excessive volume or zoning laws imposing location restrictions upon adult theatres). Because the must-carry provisions are content-based under prevailing First Amendment principles and because there is nothing incidental about the occupation of a substantial portion of cable operators' channel capacity or the concomitant effect upon the speech of cable programmers, the *Ward/Renton* content-based analysis does not apply here.[15]

Relying upon *Ward*, J.S. App. 19a, and upon the legislative findings promulgated with the 1992 Cable Act, the majority viewed the must-carry provisions as economic legislation, representing an effort by Congress "to level the economic playing field in the television industry", J.S. App. 22a; *id.* at 12a (congressional use of "regulatory powers over the economy to impose order upon a market in dysfunction, but a market in a commercial commodity nevertheless; not a market in 'speech'"), and declined to look further.

If the majority had, to any meaningful extent, looked beyond the proffered legislative justifications, it would have concluded that the must-carry provisions are content-based "by any commonsense understanding of the term"; these provisions necessarily alter the content of the programming a cable operator

---

[15] *See* J.S. App. 54a-55a (Williams, J., dissenting) ("[a]pplication of a test for 'incidental' burdens upon speech seems highly artificial here. Given the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down; there is nothing 'incidental' about the burden") (footnote omitted).

presents to the public and replace it with content selected by the government. Yet, the majority, though recognizing that "*video signals have no other function than to convey information*", *id.* at 13a (emphasis added), and that such signals "*can only be used to convey a message*", *id.* at 12a (emphasis added), persisted in its view of the must-carry provisions as neutral, economic regulation and dismissed the communication of information by video signals as of "no particular significance". *Id.* at 12a-13a.

More significantly, the majority posited that the must-carry provisions regulate a commodity—"the means of delivery of video signals"—and compared that to regulation of the use of other commercial commodities, such as printing presses, loudspeakers or movie projectors. *Id.* at 12a-13a. However, content-neutral regulations pertaining to printing presses, movie projectors or video signals would establish standards for safety, quality or size—concerns that the must-carry provisions do not even remotely implicate. A more accurate and telling analogy would be legislation that tells the owner of the movie projector which producer's films must be placed inside and shown by the movie projector or that tells the owner of the printing press what articles must be printed on that press and included in a publication. In either case, "by any commonsense understanding of the term", the legislation would be considered content-based. No different conclusion should have been reached for the must-carry provisions.

2. The Legislative Findings Themselves Indicate that the Must-Carry Provisions Are Content-Based.

Even under the majority's own analysis, focusing exclusively as it did upon the findings reached in the 1992 Cable Act, the must-carry provisions are content-based. Congress's findings reflect a content-related legislative judgment about the value of local broadcast speech. *Id.* at 53a (Williams, J., dissenting) ("the beneficiaries are local stations that are required by government to include specific content that the government has deemed especially worthy"). For example, § 2(a)(11), a finding Judge Williams believed to be "quite explicitly" based on content, states: "Broadcast television stations continue to be an important

source of local news and public affairs programming and other local broadcast services critical to an informed electorate." This finding, however, is merely illustrative of the content-based nature of §§ 4 and 5; a number of other findings equally demonstrate that Congress guaranteed carriage of local broadcasters based on a judgment about the value of their speech.[16] The legislative history likewise reveals similar content-based judgments.[17]

---

[16] *See, e.g.*, § 2(a)(7) (citing substantial interest in ensuring access to "local noncommercial educational stations" and stating that "distribution of unique noncommercial, educational programming services advances that interest"); § 2(a)(8)(A) ("public television provides educational and informational programming to the Nation's citizens"); § 2(a)(8)(B) ("public television . . . provides public service programming that is responsive to the needs and interests of the local community"); § 2(a)(8)(C) (specifying public television's "integral role in serving the educational and informational needs of local communities"); § 2(a)(10) (citing the interest in "local origination of programming"). Even § 2(a)(13) of the 1992 Cable Act, an ostensibly neutral finding concerning the "marked shift in market share from broadcast television to cable television services", is content-based, because it demonstrates that Congress is actually concerned about what programming the public is viewing.

[17] *See, e.g.*, H. R. Rep. No. 628, 102d Cong., 2d Sess. 56 (1992) ("H.R. Rep.") (discussing the "importance of local programming", including local news); H.R. Rep. 69 (discussing array of noncommercial programming, such as "Sesame Street", "3-2-1 Contact", "The MacNeil/Lehrer NewsHour" and "Nova"); H.R. Rep. 51–52 (discussing the harm noncarriage poses to local broadcasters in the form of "forced reductions in local news, public affairs, and other public interest programs"). S. Rep. No. 92, 102d Cong., 1st Sess. 59 (1991) ("S. Rep.") (citing potential audience loss by broadcasters who might be "unable to continue to provide local public service programming . . . [t]hat would . . . lead to diminished diversity of opinion").

Also telling is that a low-power station cannot qualify for carriage, unless it "meets all the obligations and requirements applicable to television broadcast stations . . . with respect to the broadcast of nonentertainment programming: programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; [and] programming for children". 47 U.S.C. § 534(h)(2)(B). In addition, the FCC must find that "the provision of such programming by such [low-power] station would address local news and informational needs which are not being adequately served by full power television broadcast stations". *Id.* Similarly, the FCC was required to promulgate rules addressing whether so-called home shopping

Moreover, the selection of the class of local broadcasters brings with it a number of additional content-related requirements. J.S. App. 51a-52a (Williams, J., dissenting) ("by virtue of provisions of law outside the 1992 Act, the term used by the Act to define the benefitted class *automatically* entails content requirements"). For example, FCC licensing regulations require a local broadcast television station to "provide programming responsive to issues of concern to its community". *In re The Revision of Programming and Commercialization Policies, Ascertainment Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, MM Docket No. 83-670, Report and Order, 98 F.C.C. 2d 1076, 1091-92 (1984). The FCC must also review, upon an application for a renewal of a broadcast station license, the extent to which a station "has served the educational and informational needs of children". 47 U.S.C. § 303b(a)(2). And, Congress has directed the FCC to promulgate regulations prohibiting the broadcasting of indecent programming during certain times of the day. Pub. L. No. 102-356 § 16(a), 106 Stat. 954 (1992) (to be codified at 47 U.S.C. § 303). Necessarily, Congress was aware of these content requirements when it gave preferential status to the class of local broadcasters and the must-carry provisions are thereby presumptively invalid. *See R.A.V. v. St. Paul*, 112 S.Ct. 2538, 2542 (1992); *see also Burson v. Freeman*, 112 S.Ct. 1846, 1855 (1992) ("distinguishing among types of speech requires that the statute be subjected to strict scrutiny"). Indeed, drawing any distinction between broadcasters and cable speakers on a class basis would lack purpose, unless Congress had weighed the relative value of their speech and found one, but not the other,

---

channels served the public interest and therefore were entitled to must-carry status. *Id.* § 534(g)(2). The Commission has determined that such channels are entitled to carriage. *See In re Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992—Home Shopping Station Issues*, MM Docket 93-8, Report and Order, 8 F.C.C. Rcd. 5321 (1993). As a result, the must-carry provisions prefer the content of a local broadcast station that provides home shopping services over the content of a cable programmer like C-Span or The Learning Channel.

wanting.[18] For these reasons, the must-carry provisions are content-based and thus should be subject to strict scrutiny.

3. The Must-Carry Provisions Compel Speech and That Triggers Strict Scrutiny.

This Court has long recognized that compelled speech is no less constitutionally suspect under the First Amendment than compelled silence. *See Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1988) ("[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say").[19] In *Riley*, the Court explained the premise underlying the principle: "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." 487 U.S. at 790-91; *see also id.* at 791 ("government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers").

The majority below, however, adopted an exceedingly restrictive view of the suspicion with which government-compelled speech should be regarded, believing that compelled speech or a speech requirement that imposed upon a speaker's

---

[18] As discussed further *infra* at pp. 32-33, Congress is allowed to impose content-related restrictions upon the broadcasting industry because of a unique characteristic—physical scarcity—that characterizes that industry. By imposing obligations upon cable operators to carry local broadcasters, Congress is, in effect, "bootstrapping" its ability to regulate the content of broadcasting into content regulation of cable television, a medium that is not characterized by physical scarcity.

[19] *See also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) ("freedom of . . . expression 'includes both the right to speak freely and the right to refrain from speaking at all'") (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("[t]he Florida [right-of-reply] statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter").

discretion to say that which he or she wished, "is to be strictly scrutinized only if it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken". J.S. App. 16a. This view misunderstands the nature of compelled speech. Compelled speech necessarily aims at content. *Riley*, 487 U.S. at 789 n.5 ("a statute regulating how a speaker may speak directly affects that speech"); *id.* at 795 ("[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and is "content-based"); *see also Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 9 (1986) (plurality opinion) ("compelled access . . . both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set").

It is for this reason that government-compelled speech is subjected to strict First Amendment scrutiny. *See Riley*, 487 U.S. at 800 ("government [may] not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored"); *Pacific Gas & Elec. Co.*, 475 U.S. at 19 (plurality opinion) (forced right of access must be narrowly tailored to further compelling state interest). In such cases, government has rarely satisfied this heavy burden. *See, e.g., Riley*, 487 U.S. at 798 (invalidating compelled disclosure by professional fundraisers); *Pacific Gas & Elec. Co.*, 475 U.S. at 9 (plurality opinion) (finding access order unconstitutional); *Wooley*, 430 U.S. at 717 (prohibiting state from requiring license plates to display phrase "Live Free or Die"); *Tornillo*, 418 U.S. at 256-58 (holding right-of-reply statute unconstitutional); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943) (invalidating compulsion to salute the flag).

The majority rejected this line of authority, choosing to rely on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), rather than the cases cited above. J.S. App. 17a. However, the principles of *PruneYard* are not applicable to the facts of this case.

First, the state access requirement in *PruneYard* had a *de minimis* effect upon the mix of information available to the

public; the shopping center owner did not engage in any editorial activity in terms of deciding who should speak or what should be said in the open areas. *See PruneYard*, 447 U.S. at 88 (noting that statute in *Tornillo* involved an intrusion into the function of editors—a concern "obviously" not presented by the shopping center). In contrast, the must-carry provisions directly affect the mix of information available to the public by telling cable operators what programming they must provide to subscribers without regard to whether the operators want to provide that programming or whether their subscribers want to receive it. Moreover, the right of access in *PruneYard* did not deprive other speakers of the right to speak. However, the must-carry provisions do substantially impair the ability of cable programmers to reach their audiences.

Second, unlike cable operators, the shopping center owner in *PruneYard* voluntarily invited the general public into the center and its common area, rendering the area akin to a public forum. *See Pacific Gas & Elec. Co.*, 475 U.S. at 12 n.8 (plurality opinion) ("the open area of the shopping center into which the general public was invited . . . was, almost by definition, peculiarly public in nature"); *see also id.* at 21, 23 (Marshall, J., concurring) ("the shopping center in *PruneYard* bore a strong resemblance to the streets and parks that are traditional public forums"). The private systems of cable operators are not akin to a public forum, nor do cable operators extend an open invitation to the public to enter those systems. For these reasons, *PruneYard* does not apply and strict scrutiny, under the compelled speech cases cited above, should have been applied.

B. The Must-Carry Provisions Override Editorial Discretion and Should Be Struck Down Under *Tornillo*.

In addition to invalidating the Florida right-of-reply statute in *Tornillo* on the ground that the statute compelled speech, this Court also held that a legislative scheme may not infringe upon the functions of editors. 418 U.S. at 258 (statute "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors"). Indeed, this Court indicated that a

statute intruding upon the editorial activity of the print press had never survived judicial review. *Id.* ("[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with [the] First Amendment").

The majority below avoided the first holding of *Tornillo* because of their mistaken belief, discussed above, that a content trigger was necessary and was here absent, and entirely ignored the second holding of *Tornillo*. On the basis of the latter holding alone, however, the must-carry provisions should be invalidated. Cable operators engage in editorial activity that parallels that engaged in by the print press. *See Leathers*, 111 S.Ct. at 1442 ("[c]able television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press'."); *City of Los Angeles*, 476 U.S. at 494 ("through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats").[20] By overriding an operator's discretion to select programming, the must-carry provisions

[20] *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (cable operators possess a "significant amount of editorial discretion regarding what their programming will include"). Indeed, the FCC itself has recognized cable's coming of age:

> "As cable systems have expanded their services to include programming from other sources, the editorial role of cable operators has grown accordingly. This editorial function whereby cable operators select and tailor their program mix to meet viewer interests or other objectives is akin to that performed by publishers of print media. Like the *Quincy* court, we recognize that concomitant with the expanding role of cable systems in providing program services is the expansion of cable operators' editorial discretion which is protected by the First Amendment." *In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, MM Docket No. 85-349, 1 F.C.C. Rcd. 864, 880 at ¶ 120 (1986), *reconsid denied*, 2 F.C.C. Rcd. 3593 (1987).

prevent cable operators from offering programming that, in their judgment, is most deserving of carriage on their cable systems.[21]

Because there is no characteristic of cable comparable to the physical scarcity of the spectrum that justifies reducing the First Amendment protection to which cable is otherwise entitled, see *infra* at pp. 31-38, the must-carry provisions should be struck down. *See Turner Broadcasting System, Inc. v. FCC*, 113 S.Ct. 1806, 1807-08 (1993) (Rehnquist, C.J., in chambers) ("Congress plainly could not impose the must-carry provisions on privately owned newspapers").[22]

C. The Must-Carry Provisions Trigger Strict Scrutiny Because They Establish a Preference for the Speech of Broadcasters at the Expense of the Speech of Cable Programmers.

The must-carry provisions abrogate the First Amendment rights of cable programmers like HBO, as well as those of cable operators. Congress perceived that viewership for broadcast television had declined in response to competition from the increased quality and quantity of cable programming. *See* 1992 Cable Act § 2(a)(13) ("[a]s a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services"). Thus, Congress, by securing channel capacity for the speech of local

[21] Moreover, the must-carry provisions give broadcast television stations the right to dictate their channel position on cable systems and thereby permit even a single broadcast channel to prevent a cable operator from presenting the most attractive package of news, information and entertainment to its subscribers. *See* Collins Aff. ¶ 27 (J.A. 252); Rosenblum Aff. ¶ 7 (J.A. 321). And, must-carry broadcast stations must be included in the basic tier of service, which all cable subscribers must receive. 47 U.S.C. § 543(b)(7).

[22] Although the speech and editorial activities of cable operators and programmers parallel that of the print press and there is no characteristic particular to cable that can justify reducing its First Amendment protection from that of any other fully protected speaker, including the print press, the Court need not reach the question whether cable's First Amendment protection is co-extensive with that of the print press in order to find that strict scrutiny applies or to determine that the provisions at issue cannot survive judicial review.

broadcast television channels, preferred their speech over, and at the expense of, that of cable programmers—their direct competitors. The must-carry provisions thus represent an effort by government to prevent cable operators from replacing less watched broadcast channels with more popular cable programming services. A governmental scheme that restricts the speech of some in order to enhance the speech of others contravenes a bedrock principle of the First Amendment, and that this is done in the name of "diversity" is of no constitutional significance. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); *see also Pacific Gas & Elec. Co.*, 475 U.S. at 14 (plurality opinion) (speaker has First Amendment right "to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents") (citation omitted).[23] Moreover, the must-carry regime goes beyond merely enhancing the relative strength of broadcasters' voices—its effect is to silence completely the voices of cable programmers on certain cable systems.

Although the $1,000 per candidate expenditure limitation in *Buckley* sought to equalize participation in the political process and was "neutral as to the ideas expressed", *Buckley*, 424 U.S. at 39, the majority considered *Buckley* to be "a case in which the government sought, in effect, to suppress the expression of a meretricious idea", because there was "[i]mplicit . . . a Congressional judgment that the speech of those spending over $1,000 was not only 'louder' than those spending less than $1,000, but was also different and, more importantly, more

[23] Indicative of how government interference in the marketplace for speech is destined to go awry is the fact that home shopping services that are transmitted by broadcast stations are guaranteed carriage by the must-carry provisions, impairing the ability of cable operators to offer cable programming services such as C-Span, CNN, or The Learning Channel.

sinister". J.S. App. 18a.[24] Even if that were a proper reading of *Buckley*, Congress here, in much the same fashion, has determined that the speech of broadcasters is more worthy or deserving of favor than that of cable speakers. Indeed, in at least one critical respect, the must-carry provisions achieve their equalizing goal in a constitutionally more troublesome manner than the expenditure limitation in *Buckley*. There the limitation merely placed a cap upon the amount that all could spend. In sharp contrast, the must-carry provisions take opportunities to speak—in the form of channel capacity—away from cable speakers and give those rights to local broadcasters in order to equalize viewership levels. Thus, the majority erred in not applying exacting First Amendment scrutiny.

D. The Must-Carry Provisions Trigger Strict Scrutiny by Singling Out a Specific Segment of the Press.

The First Amendment's Free Speech and Free Press clauses recognize the indispensable societal interests served by an uninhibited press and therefore shield the press from untoward governmental interference. *See Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.").[25] Government's guardianship of the public mind can take the form of heavy-handed regulatory schemes that unduly burden or entirely foreclose an ability to present public opinion and comment. *See City of Lakewood v.*

[24] Interestingly, by looking beyond the "neutral" justification asserted in *Buckley* to find that Congress was in fact regulating content, the majority engaged in an analysis quite unlike the approach it had taken with respect to the must-carry provisions.

[25] *See also Smith v. California*, 361 U.S. 147, 155 (1959) ("'[t]he fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States'") (quoting *Roth v. United States*, 354 U.S. 476, 488 (1957)); *see generally*, Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975).

Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988) ("a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint"); *Lovell v. City of Griffin*, 303 U.S. 444, 452-53 (1938) (invalidating municipal ordinance requiring a license to distribute literature by hand). However, it is no less suspect for government selectively to burden speech, especially when government exercises discretion to impose burdens specifically upon the press, or upon certain members of the press, leaving others free from those burdens. *See, e.g., Arkansas Writers' Project*, 481 U.S. at 228 ("singling out the press as a whole or targeting individual members of the press—poses particular danger of abuse by the State"); *Minneapolis Star*, 460 U.S. at 591 ("Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers").

Although regulation that singles out the press to impose burdens triggers heightened First Amendment scrutiny, this is not to say that the First Amendment proscribes any regulation of the press. Such is clearly not the law, nor should it be. As recognized in this Court's decisions, the First Amendment is not an obstacle to regulation that is generally applicable to all, including the press. *See, e.g., Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56 (1951) (antitrust laws); *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (same); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (labor laws). The principle is equally valid with respect to generally applicable taxation. *Leathers*, 111 S.Ct. at 1447 (upholding generally applicable sales tax applied to cable television). Legislation of general applicability does not implicate the "fear that a government will 'destroy a selected group . . . if it must impose the same burden on the rest of its constituency". *Minneapolis Star*, 460 U.S. at 585.

In contrast, the inherent political constraints associated with general applicability are absent when legislation targets the press, or certain members of the press, and imposes burdens upon them

from which others are exempt.[26] Principally for this reason, "differential treatment . . . suggests that the goal of the regulation is not unrelated to suppression of expression", *Minneapolis Star*, 460 U.S. at 585, and government must satisfy strict First Amendment scrutiny. *Id.* (State must "assert a counterbalancing interest of compelling importance that it cannot achieve without differential taxation"); *see also id.* at 592-93 ("[a] tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action").

With the must-carry provisions, Congress has singled out cable operators—members of the press—and imposed a burden upon them, compulsory carriage of local broadcast stations on their cable systems, from which all others, including other segments of the press, remain exempt. Illustrating the precision with which Congress has taken aim, other multichannel video programming delivery systems that—as Congress recognized—compete with cable, including multichannel multipoint distribution ("MMDS") or "wireless cable" systems, satellite master antenna television ("SMATV") systems, and direct broadcast satellite systems ("DBS"), are not subject to the must-carry provisions.[27]

The majority below did not take issue with the argument that the must-carry provisions target a particular group of speakers, acknowledging that the provisions are "industry specific". J.S. App. 13a. Further, the majority recognized that a presumption of

---

[26] *See Leathers*, 111 S.Ct. at 1443 ("[w]hen such a law applies only to a single constituency, however, it is insulated from this political constraint"); *Minneapolis Star*, 460 U.S. at 585 ("[w]hen the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened").

[27] Pursuant to § 25 of the 1992 Cable Act, however, DBS operators are obligated to dedicate between four and seven percent of their channel capacity "for noncommercial programming of an educational or informational nature". 47 U.S.C. § 335(b)(2). In the portion of Time Warner's civil action that was severed from its challenge to the constitutionality of the must-carry provisions, this provision was held to be unconstitutional. *See Time Warner Entertainment Company, L.P. v. FCC*, ___ F. Supp. ___, 1993 WL 393000 (D.D.C. Sept. 16, 1993).

unconstitutionality has been applied "to certain taxes that single out members of the press". *Id.* at 18a n.22. However, it rejected applying this presumption to §§ 4 and 5, because it was "unpersuaded that mandatory carriage of local broadcasters, as opposed to the specifically targeted differential taxes struck in *Minneapolis Star*, will so cripple cable operators as to leave them unable to exercise their own constitutionally conferred right to inform and entertain the public as they wish". *Id.* According to the majority, the inference of government censorship usually associated with targeted legislation did not arise in the must-carry context because "there are plausible legitimate goals that can be served by compelling broadcast carriage that cannot be served by any generally applicable means". *Id.*

The majority's reasoning is flawed. *First*, the application of strict scrutiny in *Minneapolis Star*, *Arkansas Writers' Project*, and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), did not turn on a regulation extinguishing or even severely impairing the speaker's ability to reach the public. In fact, the taxes struck down in *Grosjean* (2%), *Minneapolis Star* (4%) and *Arkansas Writers' Project* (4%) imposed only slight, and certainly not crippling, burdens upon the newspapers involved. In contrast, the effect of the must-carry provisions is severe—taking over 40% of a typical cable system's capacity and requiring the dedication of that capacity to local broadcasters. *Second*, the impact of the must-carry provisions upon First Amendment activity is more significant than that of a tax. A tax diminishes net profitability and thereby only indirectly affects the ability to speak. In contrast, the effect of the must-carry provisions upon speech is direct and immediate: Cable operators are compelled to say that which they otherwise would not and all channels that Congress requires to be allocated to local broadcasters are lost to the speech of both cable operators and cable programmers. *Third*, the majority's characterization of the must-carry provisions as "industry specific antitrust legislation" or merely "economic regulation", when the industry targeted or regulated is a member of the press and the regulation affects speech, is not a rationale for declining to apply strict scrutiny—indeed, it is the precise reason to do so. *Fourth*, the majority's conclusion that the must-carry provisions plausibly serve legitimate goals that could not be served by generally applicable means is only relevant in scrutinizing a statute, but it is not relevant to determining what level of scrutiny should apply.[28]

II. THERE ARE NO CHARACTERISTICS OF CABLE THAT JUSTIFY REDUCING ITS PROTECTION UNDER THE FIRST AMENDMENT.

Cable systems today are an important, if not the principal, source of news, opinion, and other information for tens of millions of people throughout this country, and have supplanted in many ways the historical role of the newspaper. *See* 1992 Cable Act § 2(a)(3) (noting that nearly 56 million households subscribe to cable, over 60 percent of the households with televisions); § 2(a)(13) (noting the "marked shift in market share from broadcast television to cable television services"). In many respects, such as its ability to communicate news information from around the world as it occurs, cable television has capabilities unmatched by most other components of the press.

In *Joseph Burstyn*, this Court recognized that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary", 343 U.S. at 503 and that those principles "make freedom of expression the rule". *Id.* Finding "no justification . . . for making an exception to that rule", this Court held that expression through motion pictures was

---

[28] In any event, generally applicable antitrust laws can be enforced against cable operators and they have been. *See, e.g., Sunbelt Television, Inc. v. Jones Intercable, Inc.*, 795 F. Supp. 333, 336 (C.D. Cal. 1992) (rejecting cable operator's First Amendment defense to local broadcast station's Sherman Act claim arising from noncarriage). If Congress believes generally applicable antitrust laws are inadequate to address certain competitive situations, it can either rewrite those generally applicable laws or it can selectively regulate the press, provided there is a compelling interest and the means are precisely tailored to further that interest. Here, quite unlike the generally applicable sales tax upheld in *Leathers*, Congress has selectively regulated the press. *See* J.S. App. 56a (Williams, J., dissenting) ("[w]hile the must-carry regulations are not in form taxes, they are in substance indistinguishable from a tax-subsidy combination—a tax falling exclusively on cablecasters, in an amount large enough to fund a subsidy for local broadcasters").

entitled to full protection under the First Amendment. *Id.* The framework is thus clear: Unless there is some characteristic peculiar to cable that justifies reducing its First Amendment protection, cable speakers should be given the same First Amendment rights as all other members of the media. As discussed below, there is no such characteristic.

A. Physical Scarcity Does Not Characterize Cable and Cannot Justify Reduced First Amendment Protection.

The only recognized rationale that has justified reduced First Amendment protection for a member of the media is the physical scarcity of the electromagnetic spectrum. *Red Lion*, 395 U.S. at 388-89. Unless government parcels out the spectrum, there would be the problem of interference: If all try to speak at once, no one can be heard. *Id.* at 388 ("only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had"). Thus, the reduced First Amendment status of broadcasting is the direct result of the umpiring role that spectrum scarcity necessitates. *Id.* ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").[29]

It is uncontroverted on the record below, however, that space for cable systems is not characterized by scarcity comparable to the broadcast spectrum. *See* Federal Defs.' Resp. to Time Warner Entertainment Company L.P.'s Statement of Material Facts

---

[29] Even in the context of broadcasting, the scarcity rationale has come under heavy attack from diverse quarters, *see, e.g., Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 508-09 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 482 U.S. 919 (1987); Laurence H. Tribe, *American Constitutional Law* 1005-06 (2d ed. 1988); *In re Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, Gen. Docket No. 84-282, 102 F.C.C. 2d 143 (1985), and this Court has hinted that it may be willing to revisit this area, *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984). Revisiting that issue, however, is not necessary for reversal here.

Allegedly Not in Dispute ¶ 23 (J.A. 370) ("[d]efendants do not dispute . . . that there exist no absolute *physical* limitations to the construction of cable systems equivalent to the physical scarcity of the broadcast spectrum").[30] And, in virtually every community, it is physically possible to have multiple cable systems, a fact Congress apparently accepts, because it has prohibited exclusive franchising of cable operators. 47 U.S.C. § 541(a)(1) ("a franchising authority may not grant an exclusive [illegible]hise").

B. Economic Scarcity Cannot, as a Matter of Law, Reduce a Speaker's First Amendment Rights.

The principle of "economic scarcity" or the theory of "natural monopoly" cannot justify reducing the First Amendment status of cable. This theory asserts that the economic characteristics of the cable industry permit only one cable operator in a given area. As a result, the cable operator is able to act as a "bottleneck" or "gatekeeper" over television programming provided to subscribers via cable. By exercising that discretion, the theory goes, a cable operator can jeopardize the economic viability of programmers, particularly broadcast television stations.

The economic scarcity theory is flawed. *First*, Congress itself has recognized in the 1992 Cable Act that several multichannel video programming delivery systems other than cable (including MMDS, television receive-only satellite program distributors and DBS systems) provide reasonable substitutes for cable. 47

---

[30] Lower courts have typically agreed. *See Quincy*, 768 F.2d at 1449 (scarcity doctrine "has no place in evaluating government regulation of cable television"); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1404 (9th Cir. 1985) (cable not characterized by electromagnetic scarcity like broadcasting), *aff'd on narrower grounds*, 476 U.S. 488 (1986); *HBO*, 567 F.2d at 45 ("an essential precondition of that [broadcast] theory—physical interference and scarcity . . . is absent"). *But see Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 396 (S.D. Fla. 1991) (finding physical scarcity in one particular community because there was little room on existing telephone poles and in existing utility ducts). However, in any location where existing space on poles and ducts is limited, there is nothing that stops would-be cable operators from adding space by, for example, erecting higher or additional telephone poles or laying cables underground.

U.S.C. § 522(12), as amended.[31] *Second*, the FCC itself has recently determined that cable operators do not possess undue power over local programming. *See In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992—Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Second Report and Order ¶ 17 (adopted September 23, 1993; released October 22, 1993) ("Second Report and Order §§ 11 and 13") ("the record suggests that cable operators do not possess undue power in the local programming or advertising markets where they face competition from local broadcast stations and other multichannel program distributors"). *Third*, Congress has found that broadcast television stations are the most popular programming services on cable systems. *See* 1992 Cable Act § 2(a)(19). It defies logic that cable operators would exercise their purported "gatekeeper" status to any notable extent if the result would be to deprive their subscribers of the most popular programming.[32] *Fourth*, even if cable operators were to exercise their discretion not to carry a broadcast television station, the public can receive the signal of that station over the air.

Even assuming, however, that economic scarcity did characterize the cable industry, this rationale fails as a matter of law to justify a reduction in First Amendment protection. Similar arguments about economic concentration were propounded in

---

[31] Moreover, although Congress has indicated that the expense of constructing a cable system may be a factor in whether there is more than one cable operator for a given geographic area, see 1992 Cable Act § 2(a)(2), it apparently does not regard it as an insurmountable factor, for the 1992 Cable Act regulates the provision of programming to cable overbuilders (cable companies who run their cables beside the cable of another cable company and offer subscribers a choice of being served by either company), 47 U.S.C. § 548, and prohibits exclusive franchises, 47 U.S.C. § 541(a)(1). *See also* S. Rep. 14 ("the Committee believes that local franchising authorities should be encouraged to award second franchises").

[32] Time Warner does not concede that cable operators are monopolists, *i.e.*, have power over price and entry. However, even a monopolist has the incentive to, and can, generate more revenue by selling services for which there is a higher demand.

Tornillo; there, the advocates of a right of access to the press argued: "[n]ewspapers have become big business"; "[c]hains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful"; and that there existed a "concentration of control of [media] outlets to inform the public". *Tornillo*, 418 U.S. at 249-50 (footnote omitted).[33] In short, the argument asserted: "The First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market", and this monopoly control required "government to take affirmative action". *Id.* at 251.

This Court flatly rejected the argument; any right of access imposed by government "at once brings about a confrontation with the express provisions of the First Amendment". *Id.* at 254. Under the First Amendment, government cannot compel access and cannot impinge on the editorial discretion of speakers, even if those speakers possess monopoly characteristics. *Id.* at 258.[34]

The majority below distinguished *Tornillo* on this point, believing that this Court had rejected the economic scarcity

---

[33] According to the opinion in *Tornillo*, one-newspaper towns were the rule, and effective competition existed in only four percent of the nation's large cities. 418 U.S. at 249 n.13. Economic factors foreclosed the obvious solution—additional newspapers. *Id.* at 251 ("the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible") (footnote omitted).

[34] This is not to say that government could not act against otherwise unlawful economic concentration, for, as previously discussed, *supra* at p. 28, members of the press are not shielded from generally applicable laws, like the antitrust laws. *See, e.g., Associated Press*, 326 U.S. at 19-20. Yet, even in *Associated Press*, this Court took care to point out that the remedy imposed by the district court did not require any association member to publish "anything which 'reason' tells them should not be published". *Id.* at 20 n.18; *see also Tornillo*, 418 U.S. at 254 (noting that the Court in *Associated Press* "carefully contrasted the private 'compulsion to print' called for by the Association's bylaws with the provisions of the District Court decree").

argument because the speech compelled was triggered by the content of the newspaper's speech and was compelled in a political context. J.S. App. 22a n.25. However, nothing in *Tornillo* limits its rejection of the economic scarcity argument to a particular context. Indeed, if the majority's rationale were accurate, government could force newspapers to print local columnists, because that requirement would be outside a "political" context. This is simply incorrect. *See Turner Broadcasting System*, 113 S.Ct. at 1807-08 (Rehnquist, C.J.). Moreover, *Tornillo*'s holding on economic scarcity does not depend upon a content trigger. As noted above, *Tornillo* does not even support a reading that a content trigger is necessary to invoke strict scrutiny—interference with the editorial function is sufficient. 418 U.S. at 258.[35] Thus, economic scarcity, or its namesake—the "bottleneck" theory—cannot, as a matter of law, justify reducing cable television's First Amendment protection.

C. Subsidy or Condition-Benefit Principles Are Not Implicated by the Must-Carry Provisions and Cannot Justify Reducing Cable's First Amendment Protection.

This Court has indicated that, although government may bestow its benefits upon some, it need not bestow those benefits upon all, even when it acts to promote speech. *See, e.g., Rust v. Sullivan*, 111 S.Ct. 1759 (1991). It may also be said that government may impose conditions upon the benefits it bestows,

[35] Although the majority gave lip service to this Court's ruling that an economic impediment to access cannot justify compelled speech, J.S. App. 22a n. 25, it then justified that compulsion "in order to overcome technological, structural, and historic, as well as economic factors creating a bottleneck". *Id.* There are no technological factors, such as spectrum scarcity, which would justify the intrusive speech regulation here, see *supra* at pp. 32-33, and the other factors are the very factors that the majority itself recognized had been determined to be insufficient to justify compelled speech in *Tornillo*. Whatever the circumstances or the factors that create a purported "bottleneck"—here, the bottleneck purportedly being that in most franchised territories there is only one cable operator – the result is the same condition as the one newspaper town in *Tornillo*. The analysis applied should thus be no different.

provided the conditions relate to the award of the benefit and the conditions are reasonable and unambiguous. *Id.* at 1774-76.

These arguments do not save the must-carry provisions. Foremost, the must-carry provisions do not purport to, and do not, in fact, grant a subsidy to cable operators. Nor is there any other benefit that the Federal government provides to cable operators for which the must-carry provisions conceivably could be construed as a related condition.[36]

Although cable operators do make use of public rights-of-way, it is not a benefit provided by the Federal Government. *Local* governments generally own those rights-of-way. The Federal government should not be allowed to impose a condition upon municipal authorization to use those rights-of-way. Moreover, the concept of "benefit" seems wholly inapposite when one recognizes that cable operators are allowed access only in exchange for substantial payments in the form of franchising fees, typically 5% of a cable operator's gross revenues. *See* 47 U.S.C. § 542(b). Finally, the use of rights-of-way cannot justify any and all regulation of cable, particularly regulation impinging upon cable's First Amendment rights. Regulation of cable based on its use of rights-of-way must be related to the burden imposed by such use. For example, a municipality could impose reasonable

[36] Consider, for example, two often cited examples of "benefits" given to cable by the Federal government. The first, the compulsory license, 17 U.S.C. § 111, which allows cable operators to provide their subscribers with copyrighted broadcast programming if they pay royalty fees, can scarcely be termed a benefit for cable, because, prior to its enactment, under this Court's decision in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), cable operators were not subject to any royalty liability. The second alleged benefit, the Pole Attachment Act, 47 U.S.C. § 224, prevents utilities from discriminating against cable operators with respect to their use of poles, ducts and rights-of-way and gives the FCC certain powers to ensure that rates, terms and conditions of pole attachment agreements are "just and reasonable", but nonetheless, the result is that cable operators pay for the purported benefit. Thus, cable's purported benefits are entirely unlike the direct financial assistance presented in *Rust*. Moreover, it is difficult to perceive how the must-carry provisions could be described as a condition related to the receipt of either of these purported "benefits", such that a cable operator could be said knowingly to have consented to the imposition of the condition in exchange for the benefit.

restrictions upon the construction of cable systems, but it cannot prescribe whose messages run through a cable and must be received in the homes of subscribers. For these reasons, a subsidy or condition-benefit analysis cannot justify reducing cable's First Amendment status in analyzing the must-carry provisions.[37]

III. THE GOVERNMENT'S JUSTIFICATIONS FOR SECTIONS 4 AND 5 REST ON FACTUAL PREMISES THAT DO NOT EXIST AND THAT, AS A MATTER OF LAW, ARE ILLEGITIMATE.

Whether exacting scrutiny or the less rigorous *O'Brien* test applies, some governmental interest sufficient to justify the restriction on speech must be identified. If exacting scrutiny applies, the governmental interest must be compelling; under *O'Brien*, the interest need be substantial. Congress has identified two interests as justifying the must-carry provisions: the preservation of local broadcasting and furthering a diversity of voices in the marketplace for speech. *See* S. Rep. 58.[38] If the majority had properly scrutinized these purported interests, and not, as it did, accorded an unwarranted level of deference to Congress's findings—particularly given the infringement of First Amendment rights—the unsubstantiated nature of these interests would have been apparent and held insufficient, even under *O'Brien*.

A. Congressional Findings, When Used to Justify an Abridgment of First Amendment Rights, Must Be Subjected to Meaningful Judicial Review.

Although this Court has recognized the deference owed to Congress, see *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 569 (1990) (weight should be accorded to expertise of agency and fact-finding of Congress with respect to "'complex' empirical

[37] Moreover, any application of the condition-benefit rationale would disregard the claims of cable programmers, who do not burden public rights-of-way and are not recipients of governmental largesse in any form.

[38] A third interest, the promotion of fair competition in the video marketplace, see S. Rep. 58, must fairly be considered subsumed by the interest in preserving local broadcasting and in furthering diversity.

question"), the Court has equally recognized the unique role of the judiciary as the final arbiter of the Constitution. *Id.* ("we do not defer to the judgment of the Congress and the Commission on a constitutional question") (citation and internal quotation marks omitted). Moreover, this Court has made clear that meaningful judicial review in the First Amendment context requires searching scrutiny of the legislative findings upon which the speech restrictions rely. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law"); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake").[39] A failure to engage in such an inquiry jeopardizes the limit that the First Amendment imposes upon the legislature. *Landmark*, 435 U.S. at 844 (were it not for the judicial function, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified").[40]

[39] Although "[a] legislature appropriately inquires into and may declare the reasons impelling legislative action", the judiciary must analyze "whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution". *Landmark*, 435 U.S. at 843.

[40] It would be especially incongruous for a statutory scheme that triggers strict scrutiny, like the must-carry provisions, to escape that scrutiny merely because Congress has made certain "findings". The danger that a legislature can "find" certain facts to support the constitutionality of a policy should be the impetus for searching judicial review. Otherwise, "a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery", *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) (Thomas, J.), and judicial review would be nothing more than "an elaborate farce", a mere rubber stamp on legislative enactments. *Id.* The must-carry provisions are illustrative of the danger. *See* J.S. App. 67a (Williams, J., dissenting) ("[i]f findings as scantily connected to the conclusion as these can justify must-carry, then the door is open—even in the area of First Amendment rights—to exercise of the most naked interest-group preferences").

The majority below accorded Congress unwarranted deference. There was not limited review of Congress's fact-finding; there was virtually none at all. Despite considerable evidence that local broadcasting was not in peril and that the congressional findings were largely unsubstantiated, the majority, "unwilling to second-guess Congress' determination", J.S. App. 27a, concluded that "Congress . . . did not agree". *Id.* at 24a. The refusal to undertake meaningful judicial review was error.

B. Local Broadcast Television Is Not Imperiled.

The purported threat to local broadcast television is based upon Congress's perception that broadcast television is in economic decline and that its future has been jeopardized by the growth of cable. *See* 1992 Cable Act § 2(a)(13) (noting "marked shift in market share from broadcast television to cable television" as a result of the growth of cable television); § 2(a)(16) (stating that "the economic viability of free local broadcast television" will be "seriously jeopardized"). If the majority had engaged in any independent review of these findings, the supposed threat to local broadcast television would have been exposed for what it is—mere chimera. Contrary to Congress's supposition, the growth of cable has not come at the expense of broadcast television; rather, broadcast television has been flourishing since the FCC's must-carry regime was struck down in 1985.[41]

Because it relied on Congress's unduly gloomy assessment of the state of the broadcast industry, the majority below did not review the assumptions underlying the premise that local broadcasting was in jeopardy. *First*, Congress perceived that cable had a competitive incentive to deny carriage to local broadcasters, because cable and broadcast television compete for

[41] As noted by Judge Williams, appellants demonstrated below that the number of commercial broadcast stations has increased by 22% (from 919 in 1986 to 1,118 in 1992) (J.S. App. 62a), the number of noncommercial educational broadcast stations increased by 15% (from 316 in 1986 to 363 in 1992) (*id.*) and the number of cities receiving broadcast television has increased by 16% (from 514 cities in 1985 to 594 in 1992) (*id.*).

advertising revenue.[42] *Second*, Congress believed that cable had the means to act upon this incentive by dropping or repositioning local broadcast stations, thereby depriving such stations of a substantial portion of their audience. *Third*, Congress found that A/B input selector switches, which allow cable subscribers to choose between receiving input over the cable system and receiving broadcast signals over the air by antenna, are not effective. Putting these three assumptions together, Congress concluded that the viability of local broadcast stations was in jeopardy without a requirement for carriage on cable systems. These assumptions, however, are all unsubstantiated and, taken together, offer nothing more than speculation as a basis for assisting local broadcasters by restraining cable.

1. The Assumption Concerning Cable's Incentives Fostered By Competition for Advertising Revenue.

The assumption that cable has the incentive to deny carriage to local broadcasters because of their competition for advertising revenue suffers from a critical flaw: Advertising revenue represents but a tiny fraction of the revenue earned by cable operators. In fact, as Judge Williams noted in dissent, it is uncontroverted that the ratio of revenue from subscription fees to advertising revenues is 25 to 1. J.S. App. 66a. Cable's overwhelming incentive, then, is to attract subscribers, not advertisers. It is specious to suggest that cable operators would risk reducing their greatest source of revenue, subscription fees, by denying carriage to popular programming like broadcast television stations, in exchange for a minuscule gain in additional advertising revenues. Indeed, the FCC itself has just concluded in a rulemaking proceeding under the 1992 Cable Act that cable operators "do not possess undue power" in local advertising markets. Second Report and Order §§ 11 and 13, ¶ 17.

[42] *See* § 2(a)(14) ("Cable television systems and broadcast television stations increasingly compete for television advertising revenues"); § 2(a)(15) (citing economic incentive not to carry broadcast signals).

2. Cable's Ability to Act on Its Incentives.

Congress's apparent belief that cable operators would act upon this purported competitive incentive is equally unsound. The conclusion that broadcasters were in danger of being dropped was based on a single study that indicates that 80% of cable operators had never dropped a single broadcast station.[43] Furthermore, only 10% of cable operators reported dropping even one station.[44] The study also failed to provide any information regarding the time period over which any drops occurred or the total number of broadcast signals that *were* being carried on cable systems.[45] It certainly is not a basis to conclude that cable operators might act upon their purported incentive by dropping broadcast television signals. Indeed, the legislative record indicates that Congress "has not found that cable systems are engaging in a widespread pattern of denying carriage of local television stations". H.R. Rep. 52.[46]

3. The A/B Switch Finding.

At the time of *Century*, the FCC strongly advocated use of an A/B switch in lieu of must-carry requirements, because there

---

[43] *Cable System Broadcast Signal Carriage Report*, FCC Staff Report, Policy & Rules Division of the Mass Media Bureau, September 1, 1988, at 13.

[44] *Id.*

[45] The study indicated that, of the 4,303 cable systems disclosing data, 869 had dropped one or more stations, for a total of 1,820 instances of drops. *Id.* But these figures represented only about one-half of the over 8,000 cable systems in the nation, and from these figures Congress extrapolated to conclude that 1,700 cable systems had dropped broadcast stations, and that there were a total of 3,640 instances of drops. H.R. Rep. 52.

[46] In addition, the record below shows that, even in the absence of must-carry rules, 98% of broadcast stations that would have been entitled to mandatory carriage were being carried voluntarily by cable operators in 1988, and the number of broadcast stations carried by cable operators *increased* 7% between 1985 and 1990. Klein Aff. ¶¶ 12-13 (J.A. 305). Also, the average cable system in 1990 carried over eight local broadcast channels. Klein Aff. ¶ 13 (J.A. 305). When viewed in the context of approximately 64,000 instances of carriages of broadcast signals, 3,600 instances of drops do not tend in the least to support the conclusion that local broadcast television is in imminent peril as a result of noncarriage.

cannot be a threat to local broadcasting if cable subscribers can freely change between reception over the air and reception via cable. The majority did not analyze the critical A/B switch finding, but rather deferred to Congress, because Congress had found that "viewers tended not to use them". J.S. App. 27a. However, Congress ignored the undisputed fact that viewers have never had to use input switching devices. As discussed above, popular local broadcast programming consistently has been available on cable systems, with or without must-carry requirements. Moreover, Congress's perception of viewer inertia, which is not based upon any reliable surveys or studies, flies in the face of "'[c]ommon sense'", which "'suggests that consumers who want to receive an off-the-air channel will quickly observe that they may need to purchase (or reconnect) antennas should their cable system cease offering their favorite broadcast stations'". *Century*, 835 F.2d at 301 (citation omitted).[47] The A/B switch finding is thus unsubstantiated.

Thus, Congress's conclusion that broadcast television is in imminent jeopardy was without basis. For this reason, the purported interest in preserving local broadcasting is not sufficient to support the constitutionality of the must-carry provisions under *O'Brien*.[48]

---

[47] To some extent, the unsupported finding by Congress on viewer inertia here parallels the Commission's unsubstantiated belief rejected in *Century* that it would take five years to educate consumers in the use of A/B switches. 835 F.2d at 302.

[48] The result is *a fortiori* if strict scrutiny applies. Moreover, the preservation of local broadcasting is not a compelling governmental interest sufficient to overcome strict scrutiny. This Court has typically recognized an interest as compelling when the ability to exercise a fundamental right is endangered or when norms of societal behavior would be jeopardized, not for an economically protectionist regime. *See, e.g., Burson*, 112 S.Ct. at 1852 (concluding that "State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process"); *Simon & Schuster, Inc.*, 112 S.Ct. at 510 (noting State's compelling interest "in ensuring that criminals do not profit from their crimes"); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990) (finding compelling the governmental interest in preventing corruption in elections). The notion that the preservation of local broadcasting constitutes a compelling interest sufficient to justify

C. There Is No Need to Further a Diversity of Voices, and Congress Cannot, in Any Event, Legislate in the Name of Diversity When It Does So By Burdening the Speech of Some Speakers in Order to Promote the Voice of Others.

Congress also relies, in part, upon an interest related to the preservation of local broadcasting—increasing the diversity of programming on cable systems. However, this purported interest also cannot justify the must-carry provisions. The proliferation of cable programmers and local origination programming of cable operators has already created a strikingly diverse array of programming services.[49] The must-carry provisions ignore the diversity achieved by cable programmers and impair—indeed, stifle—the ability of those services to obtain access to audiences by compelling carriage of local broadcasters and reducing the cable operator's discretion to provide subscribers with those services. *See* J.S. App. 58a (Williams, J., dissenting) ("[i]t is far from clear that giving local broadcasters an entitlement to be carried will increase program diversity *at all*"; "the must-carry rules may have little effect, but where they have any, it will only be to replace the mix chosen by cablecasters—whose livelihoods depend largely on satisfying audience demand—with a mix derived from congressional dictate"). Thus, the must-carry provisions prefer the homogenous programming of broadcast television to the array of programming provided by cable. *See*

restricting the speech rights of operators and programmers can find no support in the First Amendment, which is a limit on government's power, not a source. *See infra* at p. 45.

[49] *See* Collins Aff. ¶ 7 (J.A. 242) (noting that cable operators may select from a vast array of programming services, including, but not limited to, C-Span I and II, Cable News Network ("CNN"); Courtroom Television Network; Black Entertainment Television; Galavision; The Discovery Channel; Mind Extension University; ESPN; Sportschannel; USA Network; and Turner Network Television); Klein Aff. ¶ 6 (J.A. 303) (noting that there are now 80 national cable programming services compared to 4 such services in 1976 and that there are now also an additional 48 regional cable programming services).

Collins Aff. ¶ 2 (J.A. 241) (noting that a former FCC Chairman has termed broadcast television the "Vast Wasteland").[50]

Even assuming *arguendo* that the must-carry provisions do implicate a diversity rationale and that this rationale is a sufficiently important governmental interest, the must-carry provisions advance the diversity agenda in a constitutionally impermissible manner—by burdening the speech of some in order to promote those government has favored. Although the majority below apparently accepted the principle that Congress has the right to legislate in furtherance of a diversity agenda, the principle is problematic.

First, the First Amendment is a constraint on Congress's power; it is not a source of power. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S.Ct. 2701, 2716 (1992) (Kennedy, J., concurring). By permitting Congress to legislate in the name of "diversity", the majority ratifies the transformation of what is a bulwark against governmental power into a weapon to be wielded at government's whim. *Second*, if Congress has determined that the marketplace for speech lacks sufficient "diversity", then Congress has, necessarily, examined and evaluated the existing mix of voices in the marketplace and found it wanting—a content-based judgment. *Third*, even assuming that a diversity goal legitimately may be advanced consistent with the First Amendment, this Court has held that government cannot pursue that interest at the cost of abridgment of others' rights to free speech.[51]

[50] In addition, the diversity rationale necessarily assumes that local broadcasting is in jeopardy, but, as shown above, this is a flawed premise.

[51] *See Pacific Gas & Elec. Co.*, 475 U.S. at 12 (plurality opinion) ("offer[ing] the public a greater variety of views" cannot be accomplished at the expense of inhibiting the expression of others or directly burdening other points of view); *Buckley*, 424 U.S. at 48-49 ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); *Tornillo*, 418 U.S. at 248, 256-58 (interest in ensuring that "a wide variety of views reach the public" could not justify the abridgment of newspapers' free speech).

IV. THE MUST-CARRY PROVISIONS ARE NEITHER PRECISELY NOR NARROWLY TAILORED TO FURTHER ANY GOVERNMENTAL INTEREST.

Even if the government demonstrates that the must-carry provisions promote a sufficiently important or compelling governmental interest, it must also prove that these provisions are sufficiently tailored to further that interest. In the area of the First Amendment, this Court has recognized that government cannot further its legislative ends with imprecision. *Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980) (government must show that regulation is "a precisely drawn means of serving a compelling state interest"); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (citations omitted). Even under *O'Brien*, this Court has indicated that regulation may not be "substantially broader than necessary to achieve the government's interest", *Ward*, 491 U.S. at 800, and that the presence of "numerous and obvious less-burdensome alternatives to the restriction . . . is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable". *Discovery*, 113 S.Ct. at 1510 n.13.[52]

The majority, however, in applying the *O'Brien* standard, stripped away *any* tailoring requirement whatsoever. In rejecting the less restrictive alternatives put forth by appellants, the majority stated that "[i]mportantly . . . under *O'Brien*, the government is not required to settle for means that serve its interests less effectively merely because an alternative might be less burdensome" and concluded that "the must-carry provisions

[52] The tailoring test articulated in *Discovery* cannot be considered more rigorous than the *O'Brien* test. First, *Discovery* involved commercial speech, which has been recognized to have somewhat less protected status under the First Amendment. Second, this Court's decisions have indicated that the "reasonable fit" tailoring test applicable in the commercial speech context is essentially equivalent to the "narrowly tailoring" requirement of *Ward*. *See Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989).

are sufficiently, if not surgically, tailored". J.S. App. 26a. Because Congress had found that "prophylactic measures were necessary", *id.* at 27a, the majority was "[o]nce again . . . unwilling to second-guess Congress' determination that the must-carry provisions are necessary to accomplish its objective". *Id.*

This analysis was wholly insufficient, and, as a result, the majority failed to recognize a critical fact—that the must-carry provisions simply do not further the purported interests in preserving local broadcasting or promoting diversity. In any event, there are obviously less-burdensome alternatives. Finally, by their terms, the must-carry provisions are overbroad.

A. The Must-Carry Provisions Do Not Further the Purported Governmental Interests.

Imposing upon cable operators requirements to carry local broadcast channels does not advance the purported governmental interests in preserving local broadcasting or in promoting diversity. These interests reflect Congress's concern with the "marked" shift in viewership levels from broadcast television stations to cable, 1992 Cable Act § 2(a)(13), and the perception that broadcast television stations would fail without sufficient viewership. However, the must-carry provisions do not secure viewership for broadcast channels; they secure access to cable systems. As Congress itself has recognized, access has not been a problem. *See* H.R. Rep. 52 (noting that there is no widespread pattern of denying carriage to broadcast stations). This suggests that the problem in broadcasting, if there is one, is not that broadcast stations are unavailable to cable viewers, but that viewers simply do not wish to watch them to the degree they once did. The must-carry provisions do not, and cannot, solve that problem. Rather, this is something an unregulated marketplace for video programming should resolve.[53]

[53] As discussed *supra* at pp. 44-45, the must-carry provisions actually undermine the purported diversity agenda.

B. There Are Obviously Less Burdensome Alternatives to the Must-Carry Provisions.

Even assuming that the must-carry provisions do further the purported governmental interests, this Court made clear in *Discovery* that it is relevant to an assessment of the reasonableness of the "fit" between legislative ends and means if obviously less-burdensome alternatives exist. 113 S.Ct. at 1510 n.13. Because there are at least two obviously less-burdensome means of advancing the purported governmental interests in preserving local broadcasting and promoting diversity, the must-carry provisions should be invalidated, even under *O'Brien*.

First, the government could have advanced goals of preserving local broadcasting and diversity by directly subsidizing the speech of broadcasters. *See, e.g.*, J.S. App. 61a (Williams, J., dissenting) ("Congress is free to subsidize favored speech if the market is too weak to sustain the quantity that Congress seeks"). A direct subsidy would not promote broadcasters' speech by curtailing the speech of others, and would not run afoul of the First Amendment. *Second*, the A/B input selector switch, discussed *supra* at pp. 42-43, represents another less-burdensome means of furthering an interest in preserving local broadcasting—a means strongly advocated by the FCC in lieu of must-carry requirements at the time of *Century*.[54] Given such obviously less-restrictive alternatives, the must-carry provisions are not sufficiently tailored.[55]

---

[54] Congress could also impose technical requirements upon television manufacturers requiring them to supply with television sets at the time of sale apparatus adequate to receive over-the-air signals. Elsewhere in the 1992 Cable Act, Congress has imposed similar requirements. *See* 47 U.S.C. § 544a(c)(2)(A) (requiring FCC to promulgate technical requirements with which television sets and video cassette recorders must comply in order to be sold as "cable compatible" or "cable ready").

[55] In dissent, Judge Williams suggested that the leased access scheme created by § 612 of the 1984 Cable Act, 47 U.S.C. § 532, which requires dedication of up to 15% of a cable operator's channel capacity to unaffiliated programmers, also represented a less burdensome alternative. J.S. App. 59a. However, the constitutionality of leased access was not before Judge Williams. Rather, he was merely suggesting what might be a closer "fit" to the interests

C. By Their Terms, the Must-Carry Provisions Are Fatally Overbroad.

The must-carry provisions, by their terms, are fatally overinclusive. *First*, although purportedly seeking to protect the competitive viability of broadcast stations and to ensure their continued availability, §§ 4 and 5 provide every local broadcast station with a right to carriage without regard to whether the particular station is imperiled.[56] *Second*, the must-carry provisions are not sufficiently tailored to further any legislative goal tied to the preservation of "localism", because all local broadcast stations indiscriminately receive the right to carriage.[57] Indeed, this overinclusiveness is especially troublesome, because cable programming that may be displaced is often more consistent with "localism". Time Warner Cable, for example, offers subscribers "New York 1", Collins Aff. ¶ 4 (J.A. 241), a 24-hour local news programming service, and there are numerous local and regional programming services. Klein Aff. ¶ 4 (J.A. 302).[58]

Because the must-carry provisions entirely fail to further their purported ends or, even when they conceivably might do so,

---

asserted. Further, even he acknowledged that measures such as § 612 "are subject to challenge under *Tornillo*, as they replace the cablecaster's speech with that of others". *Id.*

[56] The rules in *Quincy* were similarly flawed. 768 F.2d at 1461 ("[t]his blanket protection, by sweeping even the most financially secure broadcaster under the rules' beneficent mantle, reaches well beyond the rules' asserted objective of assuring that the advent of cable technology not undermine the financial viability of community-oriented, free television").

[57] This also is an infirmity from which the *Quincy* rules suffered. *Id.* at 1460 ("the rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator").

[58] In fact, the requirements imposed upon some cable operators by § 5 to import the signal of a noncommercial station from a distant community could never advance the goal of preserving local broadcasting. It reflects instead a content-based, and highly paternalistic congressional judgment that people should watch government supported noncommercial broadcast stations.

restrict far more speech than is constitutionally permissible, they should be invalidated.

CONCLUSION

For the foregoing reasons, §§ 4 and 5 of the 1992 Cable Act, 47 U.S.C. §§ 534 and 535, should be declared unconstitutional in their entirety and the decision of the three-judge district court below should be reversed.

November 9, 1993

Respectfully submitted,

BRIAN CONBOY
THEODORE CASE WHITEHOUSE
WILLKIE FARR & GALLAGHER
Three Lafayette Center
1155 21st St., N.W.
(Suite 6000)
Washington, DC 20036-3384
(202) 328-8000

ROBERT D. JOFFE*
STUART W. GOLD
STEPHEN S. MADSEN
EDWARD J. WEISS
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, N.Y. 10019
(212) 474-1000

Counsel for Appellant Time Warner Entertainment Company, L.P.

*Counsel of Record